

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC92175
)	
EMILY BOLDEN,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 7
THE HONORABLE JOHN J. RILEY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

JESSICA HATHAWAY
Missouri Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662
314.340.7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

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REPLY ARGUMENT

I.

Instruction 14 was riddled with mistakes that caused plain error.

As argued in Ms. Bolden's initial brief, the omission of language relating to multiple assailants went to the heart of the defense, and reflects a problem with the approved instruction, MAI-CR 3d 306.08, that should be corrected. App. Sub. Br. 18-25. Instruction 14 did not contain language that should be included when there is evidence that the defendant was acting in defense of another in response to multiple assailants. App. Sub. Br. 23-25, 27-28.

The State does not dispute that the model instruction on defense of others should be corrected to be consistent with the model self-defense instruction. MAI-CR 3d 306.06 (Note on Use 7). Rather, the State argues there was no "substantial evidence" that would have supported the multiple assailants language that Emily's case required. The State argues, "there was no evidence that Fannie Powell (with the assistance of others) attacked, or intended to attack, Randy Bolden in any manner." Resp. Sub. Br. 21.

The State's argument is without merit because it views the evidence in a light most favorable to the State. It "ignores the fact that the decision whether to instruct on [justification] must be made by viewing the evidence in the light most favorable to the defendant." *State v. Miller*, 91 S.W.3d 630, 633 (Mo. App. W.D. 2002). "Where there is conflicting evidence concerning the issue of [justification], the instruction must be given." *State v. Allison*, 845 S.W.2d 642, 646 (Mo. App. W.D. 1992); *State v. Weems*,

840 S.W.2d 222, 227 (Mo. banc 1992). According to evidence at trial, Tiffany Powell, Fannie Powell, and a man presumed to be Fannie's husband yelled threats from inside the Powells' apartment. Tr. 749, 751, 753. Tiffany Powell stabbed Randy Bolden in the eye, blinding him. Tr. 755. Then, Randy testified that someone else struck him on the head, knocking him unconscious. Tr. 759. He woke up in an ambulance. Tr. 759. Emily Bolden testified that Tiffany Powell, Fannie Powell, and the man were attacking her brother, necessitating the use of force against Fannie Powell as well as Tiffany. Tr. 820. Emily testified that when she saw the Powells attack her brother, she grabbed a knife from her car and "started swinging." Tr. 820. She wanted them to back up away from her brother. Tr. 820. She was afraid both she and Randy would be hurt. Tr. 821.

This Court has previously defined "substantial evidence" as:

evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; it is evidence from which the trier or triers of the fact reasonably could find the issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from it the facts, to establish which the evidence was introduced.

Fujita v. Jeffries 714 S.W.2d 202, 206 (Mo. App. E.D. 1986) (citing *Collins v. Division of Welfare*, 270 S.W.2d 817, 820 (Mo. banc 1954)). Put another way, "[s]ubstantial evidence is that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inferences which can be drawn from it, and

deferring all issues of weight and credibility, to the fact finder.” *Fujita*, 714 S.W.2d at 206. Where there is conflicting evidence, the contradiction must be resolved in favor of the defendant. *State v. Vancil*, 976 S.W.2d 628, 630 (Mo. App. E.D. 1998). Under this standard, contrary to the State’s argument, the defendant’s evidence that Fannie Powell, Tiffany Powell, and the man were attacking Randy Bolden constituted “substantial evidence” that would support the multiple assailants language, even if it conflicted with the State’s theory.

Vancil illustrates the point. In that case, there was evidence of what the Court characterized as a “melee” similar to the one in this case. 976 S.W.2d at 630. The fight resulted in injury to two victims, but the evidence was conflicting as to which of those two men had been pursuing another man whom the defendant was protecting. *Id.* “[D]ue to the conflicting nature of the testimony presented at trial, it is not clear which victim [the defendant] attacked allegedly in [another’s] defense” and the defendant was entitled to a defense of others instruction as to both victims. *Id.*

Here, similarly, Emily’s case required a correct instruction as to both Tiffany and Fannie Powell, since there was evidence that both women, as well as an unknown man, were yelling threats and attacking Emily’s brother, with one of them (the evidence was not clear which) hitting Randy over the head and knocking him unconscious. Tr. 749, 751, 753, 755, 759, 820, 821. To follow the State’s line of reasoning would improperly ignore all of the defendant’s evidence. *Vancil*, 976 S.W.2d at 630.

And, contrary to the State's assertions, Emily's case was manifestly prejudiced by the incorrect instruction. Resp. Sub. Br. 22. To illustrate the error was harmless, the State points to another part of this lengthy instruction that contains "broad language" about the defendant's right to defend another against the imminent use of force. Resp. Sub. Br. 23. Part of the error, however, was in the section of the instruction that gave specific, enumerated elements to the jury. It stated, "you are instructed as follows" and gave three separate elements, two of which were erroneous. *See* App. Sub. Br. 21-22 (section 6 of the instruction). Because there was error in the enumerated elements that the jury was ordered to consider, which the State admits was the more "specific part of the instruction," the error was not harmless. Resp. Br. 24. The Missouri Approved Instructions and its Notes on Use are "not binding" to the extent they conflict with the substantive law. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997) (*citing State v. Anding*, 752 S.W.2d 59, 61 (Mo. banc 1988)).

Pronoun Error. The State repeatedly characterizes the instructional error substituting "he" for "she" as a mere "typographical error" that could not have confused the jury. Resp. Br. 25-27. However, simply reading the instruction shows the error was substantive. L.F. 38; App. Sub. Br. 19 (section 3 of the instruction). Coupled with the omission of the language about multiple assailants, the ambiguity in the instruction on the issue of whose "reasonable belief" was at issue very likely confused the jury. This instruction failed to give the basic protections of a fair trial: that the jury find every fact

necessary to constitute the essential elements of the offense charged. *State v. Krause*, 682 S.W.2d 55, 56 (Mo. App. E.D. 1985).

Standard of Review. The State makes an effort to argue that because Ms. Bolden's lawyer and the State jointly submitted the instruction, that should prevent this Court from correcting an obvious injustice under the plain error standard of review. Rule 30.20.

Ms. Bolden admits that her lawyer and the State are both to blame for submitting this incorrect instruction, and that she has the burden to show plain error. App Br. 15-16. However, Ms. Bolden believes she has easily met that burden. Simply looking at the correct instruction side-by-side with the given instruction shows how "obvious" the errors were. App. Br. 18-22. The State overlooks that it, too, was a proponent of the instruction that was obviously incorrect. *Hall v. Cooper*, 691 S.W.2d 507, 509-510 (Mo. App. W.D. 1985) (stating, "The burden to prove that the error was not prejudicial is allocated to the proponent of the instruction."). Also, ultimately, it is the trial court's responsibility to ensure the jury is correctly instructed. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003).

On the issue of prejudice, the verdict in the case reflects that on four of the six charged counts, the jury found Ms. Bolden's and her brother's testimony to be credible. L.F. 6. On Counts III and IV, there was significant evidence of aggressive acts by others acting with Fannie Powell that the erroneous instruction did not allow the jury to consider. Tr. 749, 751, 753, 759, 820, 821. Further, the jury was confused about whose

reasonable belief regarding the use of force it was to consider. Had the jury been correctly instructed, Emily would have been acquitted of all charges.

CONCLUSION

On Point I, based on her arguments in this brief and her initial brief, Ms. Bolden asks this Court to remand for a new trial.

Alternatively, on Point II, based on her arguments in her initial brief, Ms. Bolden asks this Court to remand for an evidentiary hearing.

Respectfully submitted,

/s/ Jessica Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 27th day of April, 2012, a true and correct copy of the foregoing brief served via the efilings system to Shaun Mackelprang of the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 1,860 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

/s/ Jessica Hathaway

Jessica M. Hathaway, Mo. Bar #49671
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